U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue Date: 26 April 2007

Case No. 2007-BLA-5416

In the Matter of:
R.C.,[1]
Claimant,

v.

GRAYS KNOB COAL COMPANY.,
Employer,
and
UNDERWRITERS
SAFETY & CLAIMS,
Carrier,
and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party in interest .

APPEARANCES:
Jerry Murphree, Lay Representative
On behalf of Claimant

H. Kent Henderson, Esq.
On behalf of Employer

BEFORE: Thomas F. Phalen, Jr.
Administrative Law Judge

DECISION AND ORDER – AWARD OF BENEFITS

[1] Effective August 1, 1006, the Department of Labor directed the Office of Administrative Law Judges, the Benefits Review Board, and the Employee Compensation Appeals Board to cease use of the name of the claimant and claimant family members in any document appearing on a Department of Labor web site and to insert initials of such claimant/parties in the place of those proper names. In support of this policy change, DOL has adopted a rule change to 20 C.F.R. Section 725.477, eliminating a requirement that the names of the parties be included in decisions. Further, to avoid unwanted publicity of those claimants on the web, the Department has installed software that prevents entry of the claimant's full name on final decisions and related orders. This change contravenes the plain language of 5 U.S.C. 552(a)(2) (which requires the internet publication), where it states that "in ***each case*** the justification for the deletion [of identification] shall be explained fully in writing." (*emphasis added*). The language of this statute clearly prohibits a "catch all" requirement from the OALJ that identities be withheld. Even if §725.477(b) gives leeway for the OALJ to no longer publish the names of Claimants – 5 U.S.C. 552(a)(2) clearly requires that the deletion of names be made on a case by case basis.

This is a decision and order arising out of a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901-962, ("the Act") and the regulations thereunder, located in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.[2]

On September 3, 2004, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a hearing. (DX 42).[3] A formal hearing on this matter was conducted on April 18, 2006, in Harlan, Kentucky by the undersigned Administrative Law Judge. All parties were afforded the opportunity to call and to examine and cross examine witnesses, and to present evidence, as provided in the Act and the above referenced regulations.

ISSUES

The issues in this case are:

1. Whether the claim was timely filed by the Claimant.

2. Whether the Claimant has pneumoconiosis as defined by the Act and the regulations;

3. Whether the Claimant's pneumoconiosis arose out of coal mine employment;

4. Whether the Claimant is totally disabled;

I also strongly object to this policy change for reasons stated by several United States Courts of Appeal prohibiting such anonymous designations in discrimination legal actions, such as *Doe v. Frank,* 951 F. 2d 320 (11th Cir. 1992) and those collected at 27 Fed. Proc., L. Ed. Section 62:102 (Thomson/West July 2005). This change in policy rebukes the long standing legal requirement that a party's name be anonymous only in "*exceptional cases*." *See Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981), *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993), *and Frank* 951 F.2d at 323 (noting that party anonymity should be rarely granted)(*emphasis added*). As the Eleventh Circuited noted, "[t]he ultimate test for permitting a plaintiff to proceed anonymously is whether the plaintiff has a substantial privacy right which outweighs the customary and constitutionally-embedded presumption of openness in judicial proceedings." *Frank*, 951 F.2d at 323.

Finally, I strongly object to the specific direction by the DOL that Administrative Law Judges have a "mind-set" to use the complainant/parties' initials if the document will appear on the DOL's website, for the reason, *inter alia,* that this is not a mere procedural change, but is a "substantive" procedural change, reflecting centuries of judicial policy development regarding the designation of those determined to be proper parties in legal proceedings. Such determinations are nowhere better acknowledged than in the judge's decision and order stating the names of those parties, whether the final order appears on any web site or not. Most importantly, I find that directing Administrative Law Judges to develop such an initial "mind-set" constitutes an unwarranted interference in the judicial discretion proclaimed in 20 C.F. R. § 725.455(b), not merely that presently contained in 20 C.F.R. § 725.477 to state such party names.

[2] The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80, 045-80,107 (2000) (to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). On August 9, 2001, the United States District Court for the District of Columbia issued a Memorandum and Order upholding the validity of the new regulations. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] In this Decision, "DX" refers to the Director's Exhibits, "EX" refers to the Employer's Exhibits, "CX" refers to the Claimant's Exhibits, and "Tr." refers to the official transcript of this proceeding.

5. Whether the Claimant's disability is due to pneumoconiosis; and

6. Whether the Claimant has established a material change in conditions under §725.309(c), (d).

(DX 40).

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

R.K. ("Claimant") was born on February 24, 1943; he was sixty-three years old at the time of the hearing. (DX 3). His formal education ended at the eighth grade, and he served in the Army for nearly three years. (DX 3; Tr. 11). Claimant's wife passed away in 1985. (DX 3). He currently has a dependant child who was born on August, 29, 1994. (DX 3).

Claimant alleged that he engaged in underground coal mine employment for "over 20 years plus," quitting in 1990 due to breathing problems which began in 1984 or 1985 and slowly progressed until he quit in 1990. (DX 3; Tr. 11 & 14). Claimant's usual work at Grays Knob involved the shuttle car, continuous miner, bolt machine, scoop, loader, cutting machine, coal drill, and his last job which was on the belt line. All of these were dusty, underground jobs; the dustiest of which was the shuttle car. (Tr. 13).

Procedural History

Claimant filed his first claim for benefits on October 8, 1991. (DX 1). On October 27, 1994 this claim was ultimately denied in a decision and order by Administrative Law Judge Julius Johnson. (DX 1). While Judge Johnson determined that Claimant suffered from pneumoconiosis arising out of coal mine employment, he determined that Claimant had not established total disability due to pneumoconiosis. The claim was appealed and reversed and remanded on June 29, 1995. (DX 1). In an opinion written by Judge Holmes on May 7, 1997 he affirmed the existence of pneumoconiosis, but stated Claimant failed to demonstrate total disability. No further action was taken in regard to this first claim.

Claimant filed a second application for benefits on September 2, 1998. (DX 2). This claim was denied in a decision and order by the District Director. Rather than appeal, Claimant filed a request for Modification. (DX 2). Since no new medical evidence was submitted, the claim was only reviewed for a mistake in determination. (DX 2). His claim was denied by the Office of Workers' Compensation Division of Coal Mine Workers' Compensation on July 16, 1999. (DX 2). As no further action was taken, the Claim was closed.

Claimant filed the instant application for benefits on April 11, 2003. (DX 3). On June 9, 2004, the Director issued a proposed decision and order granting benefits and finding one dependant for the purposes of augmentation. (DX 33). Employer appealed on June 18, 2004. (DX 34). This matter was transferred to the Offices of Administrative Law Judges on September 3, 2004 for a formal hearing. (DX 40).

Length of Coal Mine Employment

Claimant stated that he engaged in coal mine employment for twenty years. (DX 4; Tr. 11). The Director determined that Claimant has at least twenty years of coal mine employment. (DX 33). Employer did not contest that Claimant worked at least twenty years in or around one or more coal mines. (DX 40). I find that the record supports this concession, (DX 6-8), and therefore, I hold that the Claimant worked at least twenty years in or around one or more coal mines.

Claimant's last employment was in the Commonwealth of Kentucky (DX 7); therefore, the law of the Sixth Circuit is controlling.[4]

Responsible Operator

Liability under the Act is assessed against the most recent operator which meets the requirements of §§ 725.494 and 725.495. The District Director identified Grays Knob Coal Co. as the putative responsible operator due to the fact that it was the last company to employ Claimant for a full year. (DX 33). The District Director submitted a post finding, stating that although Grays Knob Coal Co. was uninsured during the time period of Claimant's Employment, Grays Knob retained the financial ability to pay any Federal Black Lung Benefits if awarded. (DX 38). Employer does not contest its designation as responsible operator. (DX 40; Tr. 6). Therefore, I find that Grays Knob Coal Co. is properly designated as the responsible operator in this case.

Timeliness

Under § 725.308(a), a claim of a living miner is timely filed if it is filed "within three years after a medical determination of total disability due to pneumoconiosis" has been communicated to the miner. Section 725.308(c) creates a rebuttable presumption that every claim for benefits is timely filed. This statute of limitations does not begin to run until a miner is actually diagnosed by a doctor, regardless of whether the miner believes he has the disease earlier. *Tennessee Consolidated Coal Company v. Kirk*, 264 F.3d 602 (6th Cir. 2001). In addition, the court stated:

> The three-year limitations clock begins to tick the first time that a miner is told by a physician that he is totally disabled by pneumoconiosis. This clock is not stopped by the resolution of a miner's claim or claims, and, pursuant to

[4] Appellate jurisdiction with a federal circuit court of appeals lies in the circuit where the miner last engaged in coal mine employment, regardless of the location of the responsible operator. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200 (1989)(en banc).

> *Sharondale*, the clock may only be turned back if the miner returns to the mines after a denial of benefits. There is thus a distinction between premature claims that are unsupported by a medical determination, like Kirk's 1979, 1985, and 1988 claims, and those claims that come with or acquire such support. Medically supported claims, even if ultimately deemed "premature" because the weight of the evidence does not support the elements of the miner's claim, are effective to begin the statutory period. [Footnote omitted.] Three years after such a determination, a miner who has not subsequently worked in the mines will be unable to file any further claims against his employer, although, of course, he may continue to pursue pending claims.

Id.

However, in a subsequent opinion, the Sixth Circuit adopted a position which states that when a doctor determines a miner is totally disabled due to pneumoconiosis, and a subsequent judicial finding holds that the claimant is not totally disabled due to pneumoconiosis, the medical determination must be a misdiagnosis and cannot "equate to a 'medical determination' under the statute." *Peabody Coal Co. v. Director, OWCP,* 48 Fed. Appx. 140 at 146 (6th Cir. Oct. 2, 2002)(unpub.). In summary, "if a miner's claim is ultimately rejected on the basis that he does not have the disease, this finding necessarily renders any prior medical opinion to the contrary invalid, and the miner is handed a clean slate for the statute of limitation purposes." *Id.*

In an unpublished opinion arising in the Sixth Circuit, *Furgerson v. Jericol Mining, Inc.*, BRB Nos. 03-0798 BLA and 03-0798 BLA-A (Sept. 20, 2004) (unpub.), the Benefits Review Board held that *Kirk*, 264 F.3d 602 is controlling and directed the administrative law judge in that case to "determine if [the physician] rendered a well-reasoned diagnosis of total disability due to pneumoconiosis such that his report constitutes a 'medical determination of total disability due to pneumoconiosis which has been communicated to the miner'" under § 725.308 of the regulations.[5]

Employer argues that a medical determination finding Claimant to be totally disabled by pneumoconiosis was made by Dr. Clarke in his March 3, 1991 report. Specifically, Dr. Clarke stated "[I]t is my opinion that this individual's [Claimant's] inability to perform coal mining and/or comparable employment is based on his coal workers' pneumoconiosis … and [he] is 100% permanently and totally disabled." (DX 1). Yet, the administrative law judge that adjudicated the case determined that Dr. Clarke's opinion on the etiological issue of total disability was unreasoned and entitled it to little weight. (DX 1). This finding was affirmed on the remand opinion written Judge Holmes on May 7, 1997. (DX 1). Both judges noted that all the other medical opinions determined that Claimant was not totally disabled by pneumoconiosis and were entitled to more weight. Both judges discredited Dr. Clarke's opinion on the basis that Dr. Clarke was unaware of Claimant's smoking history, and thus he "could find no other

[5] I find that when *Kirk*, *Peabody Coal*, and *Ferguson* are read *in pari materia*, the following principal of law emerges: In order that a communicated diagnosis of total disability of pneumoconiosis be sufficient to bar a black lung claim on the basis of timeliness, the communicating physician's report must be both well reasoned and well documented. Nevertheless, while I have applied this standard in the instant case, I note that this claim would not be barred under § 725.308(a) under any of the individual tests articulated above cases.

etiology" for Claimant's totally disabling impairment. Thus, I find that Dr. Clarke's finding of total disability to pneumoconiosis was not a proper medical determination due to the fact he considered no smoking history. Thus, I find this claim is timely filed.[6]

NEWLY SUBMITTED MEDICAL EVIDENCE

Section 718.101(b) requires any clinical test or examination to be in substantial compliance with the applicable standard in order to constitute evidence of the fact for which it is proffered. *See* §§ 718.102 - 718.107. The claimant and responsible operator are entitled to submit, in support of their affirmative cases, no more than two chest x-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two blood gas studies, no more than one report of each biopsy, and no more than two medical reports. §§ 725.414(a)(2)(i) and (3)(i). Any chest x-ray interpretations, pulmonary function studies, blood gas studies, biopsy report, and physician's opinions that appear in a medical report must each be admissible under § 725.414(a)(2)(i) and (3)(i) or § 725.414(a)(4). §§ 725.414(a)(2)(i) and (3)(i). Each party shall also be entitled to submit, in rebuttal of the case presented by the opposing party, no more than one physician's interpretation of each chest x-ray, pulmonary function test, arterial blood gas study, or biopsy submitted, as appropriate, under paragraphs (a)(2)(i), (a)(3)(i), or (a)(3)(iii). §§ 725.414(a)(2)(ii), (a)(3)(ii), and (a)(3)(iii). Notwithstanding the limitations of §§ 725.414(a)(2) or (a)(3), any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence. § 725.414(a)(4). The results of the complete pulmonary examination shall not be counted as evidence submitted by the miner under § 725.414. § 725.406(b).

Claimant selected Glen Baker, M.D. to provide his Department of Labor sponsored complete pulmonary examination. (DX 10). Dr. Baker conducted the examination on July 10, 2003. (DX 11). I admit Dr. Baker's report under § 725.406(b).

Claimant completed a Black Lung Benefits Act Evidence Summary Form. (CX 4). Claimant submitted x-ray readings of a January 3, 2002 film by Dr. Deponte and a January 13, 2006 film by Dr. Alexander as initial evidence. Claimant also submitted the x-ray reading of the July 10, 2003 film by Dr. Baker as the OWCP evaluation and a reading of the April 1, 2004 film read by Dr. Alexander as rebuttal evidence. Next, Claimant designated Dr. Roatsey's PFT of January 6, 2006, and Dr. Narayman's PFT of January 19, 2004 as initial evidence and Dr. Baker's July 10, 2003 PFT as the OWCP evaluation. Claimant also submitted the Daniel Boone Clinic's ABG of March 25, 2004 as initial evidence and Dr. Baker's July 10, 2003 ABG as the OWCP evaluation. In terms of the medical reports, Claimant submitted Dr. Almusaddy's report dated April 7, 2006 as initial evidence, with Dr. Baker's report dated July 10, 2003 as the OWCP evaluation. Finally, Claimant submits the treatment records from Kellie Brooks from December

[6] Furthermore, it is the Employer's burden to show that a medical determination of total disability due to pneumoconiosis has been *communicated* to the miner under § 725.308(c)(*emphasis added*); *See also Tennessee Consolidated Coal Company,* 264 F.3d 602 (where the court notes the statute of limitations clock begins to run when the miner is first told by a physician he has pneumoconiosis). Employer has shown no evidence that Dr. Clarke communicated his findings to Claimant. Thus, even if I disagreed with Administrative Law Judges Johnson and Holmes, and found that Dr. Clarke's opinion was entitled to more than little weight, Employer would still not have met its burden.

4, 2000 to March 14, 2004. Claimant's evidence complies with the requisite quality standards of §§ 718.102-107 and the limitations of § 725.414 (a)(3). Therefore, I admit the evidence Claimant designated in its summary form.

Employer completed a Black Lung Benefits Act Evidence Summary Form. (EX 3). Employer included Dr. Dahhan's x-ray, PFT, ABG and Medical report from March 1, 2004 as initial evidence.[7] Employer also submits a re-reading of the March 1, 2004 x-ray by Dr. Wiot as initial evidence. Employer's evidence complies with the requisite quality standards of §§ 718.102-107 and the limitations of § 725-414 (a)(3). Therefore, I admit the evidence Employer designated in its summary form.

X-RAYS

Exhibit	**Date of X-ray**	**Date of Reading**	**Physician / Credentials**	**Interpretation**
DX 13	1/03/2002	1/20/2002	Deponte, BCR, B-reader	1/1pp
DX 13	5/05/2003	5/16/2003	Aycoth, B-reader	1/0pp
DX 11	7/10/2003	7/10/2003	Baker, B-reader[8]	1/0ts
DX 12	7/10/2003	7/25/2006	Barrett, BCR[9], B-reader	Quality only
DX 15	4/01/2004	4/01/2004	Dahhan, B-reader	Negative
EX 1	4/01/2004	7/29/2004	Wiot, BCR, B-reader	Negative
DX 14	4/01/2004	5/29/2004	Alexander, BCR, B-reader	2/1
CX 1	1/13/2006	1/26/2006	Alexander, BCR, B-reader	1/2

PULMONARY FUNCTION TESTS

Exhibit/ Date	**Co-op./ Undst./ Tracings**	**Age/ Height**[10]	**FEV_1**	**FVC**	**MVV**	**FEV_1/ FVC**	**Qualifying Results**
DX 11 7/10/2003	Fair/Good	60/67.0	2.31	4.31		54	No

[7] I note that Dr. Dahhan's Medical Report was written on March 22, 2004 – but was taken from his evaluation made on March 1, 2004.

[8] A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health and Human Services. This is a matter of public record at HHS National Institute for Occupational Safety and Health reviewing facility at Morgantown, West Virginia. (42 C.F.R. § 37.5l) Consequently, greater weight is given to a diagnosis by a "B" Reader. *See Blackburn v. Director, OWCP*, 2 B.L.R. 1-153 (1979).

[9] A physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. *See* 20 C.F.R. § 727.206(b)(2)(III). The qualifications of physicians are a matter of public record at the National Institute of Occupational Safety and Health reviewing facility at Morgantown, West Virginia.

[10] I must resolve the height discrepancy recorded on the pulmonary function tests. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). Here, we have two doctors finding Claimant to be 67.0 inches, one at 67.5, and one at 69.0. Given that three out of four of the measurements find Claimant to be around 67 inches, I find Claimant to be 67 inches tall.

DX 13 1/19/2004	Good/Good	60/69.0	1.56	2.66		59	No
DX 15 4/01/2004	Good/Good	61/67.5	1.82 1.85*	2.97 2.70*	50 60*	61 69*	Yes Yes
CX 2 1/06/2006	Good/Good	62/67.0	1.47	2.62		56	No

* post-bronchodilator values

ARTERIAL BLOOD GAS STUDIES

Exhibit	**Date**	**pCO_{2*}**	**pO_{2*}**	**Qualifying**
DX 11	7/10/2003	35.0	63.0	Yes
DX 15	4/01/2004	37.8	62.8	Yes
DX 13	3/25/2004	37.0	62.0	Yes

All values are pre-exercise

Treatment Records[11]

January 29, 2001 – Office notes from Dr. Kellie Brooks noting a history of twenty-two years of coal mine employment, as well as a history of breathing difficulty. The report states Claimant has a history of COPD, coronary artery disease, heart attacks in 1996 and 1999, hypertension, hypercholesterolemia, and arthritis. It also notes that Claimant does not smoke, drink alcohol, or use drugs.[12] A pulmonary exam reveals wheezing. She assesses that Claimant suffers from dyspnea and respiratory abnormalities.

March 1, 2004 – Office notes from Dr. Kellie Brooks noting Claimant suffers from coal workers' pneumoconiosis as well as COPD. She takes notes on a history of breathing trouble, noting that Claimant feels as though the condition is "getting worse." She also conducts a physical examination, but her handwriting is mostly illegible.

Narrative Reports

Dr. Glen Baker, an internist, pulmonologist, and B-reader, examined Claimant on November 16, 2002 and submitted a report. (DX 11; 43).[13] Dr. Baker considered the following: symptomatology (fourteen years of daily sputum, wheezing dyspnea, cough, eight years of chest pain, ten years of orthopnea, and shortness of breath at night), employment history (twenty years underground coal mine employment, last working as a shuttle car operator, quitting in 1987), individual history (fourteen years of wheezing, chronic bronchitis, arthritis, heart disease and seven to eight years of high blood pressure), family history (high blood pressure and heart

[11] The x-ray, PFT, and ABG results from the treatment records are identified in the above charts as DX 13. I also find that Dr. Brooks's notes do not provide any reasoning behind her diagnoses, nor does she directly connect any pulmonary condition to coal mining through her notes. Therefore, I accord her notes no weight.
[12] At this point, Claimant no longer smoked; however, a smoking history is not included in the report.
[13] Due to a remand I issued, Dr. Baker issued a subsequent report to clarify his findings. (DX 43).

disease), smoking history (a pack day beginning in his teens until November of 1996), physical examination, chest x-ray (1/0), PFT (mild restrictive defect), ABG (moderate resting arterial hypoxemia), and an EKG (normal sinus rhythm with an older inferior infarct, with ST-T changes)). Dr. Baker diagnosed CWP based on the x-ray and Claimant's exposure to coal dust, which he attributed to coal dust exposure. He also diagnosed chronic bronchitis based on history of cough, sputum production and wheezing, COPD with a mild obstructive defect based upon the PFT, a moderate hypoxemia based upon Claimant's PO_2 levels, and ischemic heart disease based upon myocardial infarctions/angioplasty. He attributed these conditions to both coal dust exposure and cigarette smoking. Dr. Baker states the impairment is moderate and opines that Claimant is totally disabled and does not retain the respiratory capacity to perform the work of an underground coal miner or to do similarly arduous manual labor in a dust-free environment.

Dr. Dahhan, an internist, pulmonologist, and B-Reader, examined Claimant on April 1, 2004 and submitted a report. Dr. Dahhan considered twenty-two years of coal mine employment ending in 1990 where he operated a shuttle car, bold machine, and cutting machine. A smoking history from an age of seventeen until age fifty-three of pack days was considered (thirty-six pack years). He noted that Claimant has a history of dyspnea on exertion (climbing stairs) with no daily cough or sputum production and no history of wheezing. Dr. Dahhan considered that Claimant has a history of coronary artery disease with hypertension, and post multiple myocardial infarctions. Upon physical examination, Dr. Dahhan noted there was good air entry to both lungs with scattered bilateral expiratory wheeze. There was no audible crepitation or pleural rubus. Dr. Dahhan noted the spirometry showed a moderate obstructive defect with no evidence of restrictive ventilatory abnormality. The x-ray showed both lungs to be clear. Based upon this evidence, Dr. Dahhan opines with a reasonable degree of medical certainty that Claimant has no evidence of occupational pneumoconiosis or pulmonary disability secondary to coal dust exposure. He bases this opinion upon the obstructive abnormalities on clinical examination of the chest, obstructive abnormalities on pulmonary function studies, and negative x-ray reading for pneumoconiosis. Thus, according to Dr. Dahhan, Claimant does not retain the physiological capacity to continue his previous coal mining work or job of comparable physical demand because of his obstructive airway disease, which is the result of his lengthy smoking habit.

In his deposition, which reiterated many of the points above, Dr. Dahhan explained how he concluded Claimant's respiratory impairment was solely attributable to cigarette smoking. Dr. Dahhan reasoned that Claimant had no exposure to coal dust since 1990.[14] The duration of the absence was sufficient to cause determination of any industrial bronchitis he may have had. The pulmonary impairment was also purely obstructive in nature and could not be explained simply by the inhalation of coal dust. Dr. Dahhan also noted that there was no evidence to suggest complicated coal worker's pneumoconiosis or progressive massive fibrosis which would cause the secondary obstructive abnormality. Finally, Dr. Dahhan concluded stating that in addition to his smoking history, Claimant's cardiac medication called "beta blocker Toprol" would cause a bronchiospasm[15] in an individual with chronic obstructive lung disease. The deposition concludes with Dr. Dahhan reiterating the fact due to: 1) the finding of the spirometry which showed only airway obstruction; 2) the amount of airway obstruction that is

[14] This equates to fourteen years.
[15] An airway obstruction

present cannot be explained by simply stipulating that the impact of coal dust has caused that reduction in the respiratory capacity; 3) and the negative x-ray, that he can conclude with absolute certainty that Claimant's respiratory disability is not the result of exposure to coal mine dust.

Dr. Almusaddy, an internist and pulmonologist, has been seeing Claimant since December 2004.[16] He considered a smoking history of over twenty years, x-rays from Drs. Deponte, Alexander, and Baker along with PFTs conducted by Drs. Baker and Roatsey, with ABGs conducted by Dr. Baker and one from the Daniel Boone Clinic dated March 25, 2004.[17] There was no mention by Dr. Almusaddy how many years of coal mine employment he considered. Basing his opinion upon objective evidence, along with his physical examinations, Dr. Almusaddy opined that Claimant possessed a moderate impairment due to coal worker pneumoconiosis, and that this impairment was due to both coal dust exposure and a COPD resulting from a twenty year smoking history and coal dust exposure. While Dr. Almusaddy opined that Claimant could not return to his previous coal mine employment, he made no opinion as to whether Claimant could perform comparable employment in a dust free environment.

Smoking History

At the hearing, Claimant testified that he ceased smoking on November 6, 1996.[18] (Tr. 17). He went on to state his pack day smoking history lasted for about "twelve to fourteen years." (Tr. 17). Dr. Baker noted a thirty-six pack year smoking history based upon the age when Claimant began to smoke until he quit. (DX 11). Dr. Dahhan noted that Claimant smoked for thirty-six pack years, which was also based upon an age calculation. (DX 15). Given all the evidence and the fact that individuals have a tendency to underestimate their smoking history, I find that Claimant smoked thirty-six pack years, quitting in November of 1996.

DISCUSSION AND APPLICABLE LAW

This claim was made after March 31, 1980, the effective date of Part 718, and must therefore be adjudicated under those regulations. To establish entitlement to benefits under Part 718, Claimant must establish, by a preponderance of the evidence, that he:

1. Is a miner as defined in this section; and

2. Has met the requirements for entitlement to benefits by establishing that he:

   (i) Has pneumoconiosis (see § 718.202);

   (ii) The pneumoconiosis arose out of coal mine employment (see § 718.203);

   (iii) Is totally disabled (see § 718.204(c)); and

[16] The letter noting how long Dr. Almusaddy had been seeing Claimant was dated April 7, 2006. (CX 3).
[17] It is not clear exactly which PFTs Dr. Almusaddy relied upon, or if he only considered PFTs in evidence.
[18] Claimant recalls this specific date as he had a heart attack.

(iv) The pneumoconiosis contributes to the total disability (see § 718.204(c)); and

3. Has filed a claim for benefits in accordance with the provisions of this part.

§ 725.202(d)(1-3); *see also* §§ 718.202, 718.203, and 718.204(c).

Subsequent Claim

The provisions of § 725.309 apply to new claims that are filed more than one year after a prior denial. Section 725.309 is intended to provide claimants relief from the ordinary principles of *res judicata*, based on the premise that pneumoconiosis is a progressive and irreversible disease. *See Lukman v. Director, OWCP*, 896 F.2d 1248 (10th Cir. 1990); *Orange v. Island Creek Coal Compamy*, 786 F.2d 724, 727 (6th Cir. 1986); § 718.201(c) (Dec. 20, 2000). The amended version of § 725.309 dispensed with the material change in conditions language and implemented a new threshold standard for the claimant to meet before the record may be reviewed *de novo*. Section 725.309(d) provides that:

> If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part, the later claim shall be considered a subsequent claim for benefits. A subsequent claim shall be processed and adjudicated in accordance with the provisions of subparts E and F of this part, except that the claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see § 725.202(d) miner. . .) has changed since the date upon which the order denying the prior claim became final. The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:
>
> (1) Any evidence submitted in conjunction with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.
>
> (2) For purposes of this section, the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based. For example, if the claim was denied solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual worked as a miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of the subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.
>
> (3) If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence establishes at least one applicable condition of entitlement.

> (4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue, shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim.

§ 725.309(d) (April 1, 2002).

In *Grundy Mining Co. v. Director, OWCP [Flynn]*, 353 F.3d 467 (6th Cir. 2003), a multiple claim arising under the pre-amendment regulations at 20 C.F.R. § 725.309 (2000), the court reiterated that its previous decision in *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994) requires that the ALJ resolve two specific issues prior to finding a "material change" in a miner's condition: (1) whether the miner has presented evidence generated since the prior denial establishing an element of entitlement previously adjudicated against him; and (2) whether the newly submitted evidence differs "qualitatively" from evidence previously submitted. Specifically, the *Flynn* court held that "miners whose claims are governed by this Circuit's precedents must do more than satisfy the strict terms of the one-element test, but must also demonstrate that this change rests upon a qualitatively different evidentiary record." *See also, Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 608-610 (6th Cir. 2001). Once a "material change" is found, then the ALJ must review the entire record *de novo* to determine ultimate entitlement to benefits.

Claimant's prior claim was denied after he failed to demonstrate total disability, and total disability arising out of coal mine employment. (DX 1). Consequently, Claimant must establish, by a preponderance of the newly submitted evidence, the existence of a totally disabling respiratory impairment caused by pneumoconiosis. If Claimant is able to prove these elements, then he will avoid having his subsequent claim denied on the basis of the prior denial.

Total Disability

Claimant may establish a material change in conditions by demonstrating that he is totally disabled from performing his usual coal mine work or comparable work due to pneumoconiosis under one of the five standards of § 718.204(b) or the irrebuttable presumption referred to in § 718.204(b). The Board has held that under § 718.204(b), all relevant probative evidence, both like and unlike must be weighed together, regardless of the category or type, in the determination of whether the Claimant is totally disabled. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195 (1986); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 B.L.R. 1-231 (1987). Claimant must establish this element of entitlement by a preponderance of the evidence. *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986).

There is no evidence in the record to show that Claimant suffered from complicated pneumoconiosis. Therefore, the irrebuttable presumption of § 718.304 does not apply.

Total disability can be shown under § 718.204(b)(2)(i) if the results of PFT studies are equal to or below the values listed in the regulatory tables found at Appendix B to Part 718.

Also, because tracings are used to determine the reliability of a ventilatory study, a study which is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984). In addition, more weight may be accorded to the results of a recent ventilatory study over the results of an earlier study. *Coleman v. Ramey Coal Co*., 18 B.L.R. 1-9 (1993).

The newly submitted PFT evidence includes one qualifying PFT and three non-qualifying PFTs. As only one of the four tests qualify according to the regulatory tables found at Appendix B to Part 718, I find that Claimant has not established total pulmonary disability under subsection (b)(2)(i).

Total disability can be demonstrated under § 718.204(b)(2)(ii) if the results of ABG studies meet the requirements listed in the tables found at Appendix C to Part 718. More weight may be accorded to the results of a recent blood gas study over a study that was conducted earlier. *Schretroma v. Director, OWCP*, 18 B.L.R. 1-17 (1993). All three PFTs produced values that meet the requirements of the tables found at Appendix C to Part 718. Therefore, I find that Claimant has established the existence of total disability under subsection (b)(2)(ii).

Total disability may also be shown under § 718.204(b)(2)(iii) if the medical evidence indicates that Claimant suffers from cor pulmonale with right-sided congestive heart failure. The record does not contain any evidence indicating that Claimant suffers from cor pulmonale with right-sided congestive heart failure. Therefore, I find that Claimant has not established the existence of total disability under subsection (b)(2)(iii).

Section 718.204(b)(2)(iv) provides for a finding of total disability if a physician, exercising reasoned medical judgment based on medically acceptable clinical or laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevented the miner from engaging in his usual coal mine employment or comparable gainful employment. Claimant's usual coal mine employment as a shuttle car operator and belt line worker required that he crawl 2,000-2,500 feet eight hours per day and lift fifty pounds several times over a distance of fifty to seventy-five feet per day (DX 5; Tr. 12-13).

The exertional requirements of the claimant's usual coal mine employment must be compared with a physician's assessment of the claimant's respiratory impairment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). Once it is demonstrated that the miner is unable to perform his usual coal mine work, a *prima facie* finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform "comparable and gainful work" pursuant to § 718.204(b)(1). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988). Nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis. § 718.204(a); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (1994). All evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing the burden of establishing by a preponderance of the evidence the existence of this element. *Mazgaj v. Valley Camp Coal Co.*, 9 B.L.R. 1-201 (1986).

The newly submitted medical narrative evidence includes reports from three physicians. Dr. Baker submitted a medical opinion along with a clarification report. In considering twenty years of coal mine employment Dr. Baker articulated that Claimant was totally disabled and could not return to his former coal mine employment or a position of similar arduous labor in a dust free environment. (DX 43)[19] He based this opinion upon PFT and ABG results as well as Claimant's history and physical examination. As Dr. Baker relied upon objective evidence and clearly articulated his opinion, I find it to be well reasoned and well documented and accord his opinion probative weight.

Dr. Mousah Almusaddy submitted a medical report. After treating Claimant since December 2004, viewing x-rays from Drs. Deponte, Alexander, and Baker along with PFTs and ABGs conducted by numerous doctors, Dr. Almusaddy opines that Claimant's moderate respiratory impairment prevents him from returning to his previous coal mine employment.[20] However, Dr. Almusaddy makes no opinion as to whether Claimant could perform comparable employment in a dust free environment. While Dr. Almusaddy bases his opinion upon objective evidence and possesses advanced credentials as both an internist and pulmonologist, he fails to account for Claimant's capacity for employment outside the coal mine industry. As such, I only accord his opinion some weight.

Dr. Dahhan submitted a medical report, which was supplemented by a deposition. After examining Claimant and the results obtained from the examination, Dr. Dahhan states that Claimant does not retain the physiological capacity to continue his previous coal mining work or a job of comparable physical demand because of his obstructive airway disease. After considering Claimant's smoking history, x-ray, PFT, ABG, coal mine employment, and the physical examination, Dr. Dahhan opines that Claimant could not return to work because of his pulmonary impairment. As Dr. Dahhan bases his conclusions upon objective evidence and possesses advanced credentials as an internist, pulmonologist, and B-Reader, I find his opinion to be well reasoned and well documented and thus accord his opinion probative weight.

The newly submitted medical opinion evidence includes two well-reasoned and well-documented reports by Drs. Baker and Dahhan finding Claimant to be totally disabled from a respiratory or pulmonary standpoint, and an opinion stating Claimant cannot return to his former coal mine employment which received some weight. As the opinions are unanimous, I find that Claimant has proven total disability by a preponderance of the evidence under subsection (b)(2)(iv).

Considering the newly submitted evidence, Claimant has establish that he is totally disabled under both subsections (b)(2)(ii) and (b)(2)(iv). Therefore, after weighing all the newly submitted evidence of total disability under § 718.204(b), I find that Claimant has satisfied this element of entitlement.

[19] Dr. Baker does state that Claimant could work at *some* position where the physical demand was less, if Claimant had the proper education/job training. (DX 43).
[20] Dr. Almusaddy only considered the x-rays and PFTs admitted into evidence.

As a result of the above, I find that Claimant has demonstrated that he is totally disabled, which constitutes a material change in conditions as required under § 725.309 (d). Therefore, Claimant's subsequent claim will not be denied on the basis of the prior denial, and thus, in order to receive benefits, he must satisfy the remaining requirements of § 718, considering both the old and new evidence.

Pneumoconiosis

Claimant has the burden of proving the existence of pneumoconiosis, as well as every element of entitlement, by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

Pneumoconiosis is defined by the regulations:

> (a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis.
>
> (1) *Clinical Pneumoconiosis*. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
>
> (2) *Legal Pneumoconiosis*. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
>
> (b) For the purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.
>
> (c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

§§ 718.201(a-c).

Section 718.202(a) sets forth four methods for determining the existence of pneumoconiosis.

(1) Under § 718.202(a)(1), a finding that pneumoconiosis exists may be based upon x-ray evidence. Because pneumoconiosis is a progressive disease, I may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (en banc); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). I may also assign heightened weight to the interpretations by physicians with superior radiological qualifications. *See McMath v. Director, OWCP*, 12 B.L.R. 1-6 (1988); *Clark*, 12 B.L.R. 1-149 (1989).

The previously submitted evidence included the following x-rays and interpretations: November 13, 1987 read positive by one doctor, and negative by one doctor; November 13, 1988 read positive by one doctor; August 13, 1990 read positive by one doctor; August 31, 1990 read positive by three doctors and negative by one doctor; February 6, 1991 read positive by one doctor; May 22, 1991 read positive by two doctors and negative by one doctor; June 15, 1991 read negative by one doctor; July 15, 1991 read negative by one doctor; August 7, 1991 read positive by one doctor; November 4, 1991 read negative by two doctors; and July 28, 1992 read positive by one doctor.[21] After viewing all the x-ray evidence, administrative law judge Johnson determined the x-ray evidence established the existence of pneumoconiosis. However, the BRB directed on remand that the qualifications of the x-ray readers be reconsidered. In an opinion written by administrative law judge Holmes, he concurred with Judge Johnson's determination of pneumoconiosis by x-ray evidence, but declined to address the x-ray reader's qualifications, as the point was moot.[22]

I have reviewed these interpretations, and find that his determination is supported by substantial evidence. However, due to the fact that these films are all at least seven years older than the newly submitted readings, I find that they are entitled to less weight.

The newly submitted evidence includes six interpretations of four chest x-rays and one quality-only interpretation. Dr. Deponte, a BCR and B-reader, read the January 3, 2002 x-ray as positive for pneumoconiosis. As there are no other contrary opinions, I find the January 3, 2002 x-ray as positive for pneumoconiosis.

Dr. Aycoth, a B-reader and member of the American College of Radiology, interpreted the May 5, 2003 x-ray as positive for pneumoconiosis. As there are no other contrary opinions, I find the May 2003 x-ray as positive for pneumoconiosis.

Dr. Baker, a B-reader interpreted the July 2003 x-ray as positive for pneumoconiosis. Dr. Barrett, a BCR and B-reader performed a quality reading. As there are no other contrary opinions, I find the July 2003 x-ray as positive for pneumoconiosis.

Dr. Dahhan, a B-reader and Dr. Wiot, a BCR and B-reader, read the March 1, 2004 x-ray as negative for pneumoconiosis. Dr. Alexander, a BCR and B-reader, read the x-ray as positive

[21] I find it unnecessary to delve into the doctors qualifications as the newly submitted x-ray evidence is more probative.

[22] The qualifications were moot because Claimant failed to establish any other elements required for benefits under the Act.

for pneumoconiosis. As two well-qualified physicians read the film as negative, and only Dr. Alexander read it as positive, I find the March 2003 x-ray negative for pneumoconiosis.

Dr. Alexander, a BCR and B-reader, read the January 13, 2006 x-ray as positive for pneumoconiosis. As there are no other contrary opinions, I find the January 13, 2006 x-ray as positive for pneumoconiosis.

I have determined that the most recently submitted x-ray evidence is more probative than the previously submitted readings, and that four of the five most recent films are positive for pneumoconiosis. Therefore, I find that Claimant has proven by a preponderance of the evidence under subsection (a)(1) that he suffers from pneumoconiosis.

(2) Under § 718.202(a)(2), a determination that pneumoconiosis is present may be based, in the case of a living miner, upon biopsy evidence. The evidentiary record does not contain any biopsy evidence. Therefore, I find that Claimant has not established the existence of pneumoconiosis through biopsy evidence under subsection (a)(2).

(3) Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of several cited presumptions are found to be applicable. In this case, the presumption of § 718.304 does not apply because there is no evidence in the record of complicated pneumoconiosis. Section 718.305 is not applicable to claims filed after January 1, 1982. Finally, the presumption of § 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982. Therefore, Claimant cannot establish pneumoconiosis under subsection (a)(3).

(4) The fourth and final way in which it is possible to establish the existence of pneumoconiosis under § 718.202 set forth in subsection (a)(4) which provides in pertinent part:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

§ 718.202(a)(4).

This section requires a weighing of all relevant medical evidence to ascertain whether or not the claimant has established the presence of pneumoconiosis by a preponderance of the evidence. Any finding of pneumoconiosis under § 718.202(a)(4) must be based upon objective medical evidence and also be supported by a reasoned medical opinion. A reasoned opinion is one which contains underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts, and other data on which he bases his diagnosis. *Oggero v. Director, OWCP*, 7 B.L.R. 1-860 (1985). On the other hand, an unsupported medical conclusion is not a reasoned diagnosis. *Fuller v. Gibraltar Corp.*, 6

B.L.R. 1-292 (1984). *See also Phillips v. Director, OWCP*, 768 F.2d (8th Cir. 1985); *Smith v. Eastern Coal Co*., 6 B.L.R. 1-1130 (1984); *Duke v. Director, OWCP*, 6 B.L.R. 1-673 (1983)(a report is properly discredited where the physician does not explain how underlying documentation supports his or her diagnosis); *Waxman v. Pittsburgh & Midway Coal Co.,* 4 B.L.R. 1-601 (1982). For instance, a medical opinion based upon generalities, rather than specifically focusing upon the miner's condition, may be rejected. *Knizer v. Bethlehem Mines Corp.*, 8 B.L.R. 1-5 (1985). Further, a medical report may be rejected as unreasonable where the physician fails to explain how his findings support his diagnosis. *See Oggero*, 7 B.L.R. 1-860.

A medical report containing the most recent physical examination of the miner may be properly accorded greater weight as it is likely to contain a more accurate evaluation of the miner's current condition. *Gillespie v. Badger Coal Co.*, 7 B.L.R. 1-839 (1985). *See also Bates v. Director, OWCP*, 7 B.L.R. 1-113 (1984) (more recent report of record entitled to more weight than reports dated eight years earlier); *Kendrick v. Kentland-Elkhorn Coal Co.*, 5 B.L.R. 1-730 (1983).

In this claim, the previously submitted evidence includes a number of reports both in support and opposed to the existence of pneumoconiosis. These reports are all more than ten years older than the most remote of the newly submitted reports. Therefore, while Judge Johnson determined that the previously submitted medical narrative evidence was not sufficient to prove the existence of pneumoconiosis, and while the evidence contained in the reports may be well-reasoned and documented, due to its remoteness and the progressive nature of pneumoconiosis, I accord it less weight than the newly submitted evidence for the purpose of determining whether Claimant suffers from pneumoconiosis under subsection (a)(4).

Turning to the newly submitted evidence, Dr. Baker diagnosed both clinical and legal pneumoconiosis.[23] Concerning the issue of clinical pneumoconiosis, Dr. Baker diagnosed the condition based upon the x-ray, physical examination, as well as the PFT and ABG results. Given that Dr. Baker relied upon objective evidence and clearly articulated his opinion, I find his diagnosis of clinical pneumoconiosis to be both well reasoned and well documented and accord it probative weight.

Dr. Baker also diagnosed chronic bronchitis based on a history of cough, sputum production, and wheezing in conjunction with his physical examination. He also found Claimant to have COPD with a mild obstructive defect based upon the PFT, and a moderate hypoxemia based upon Claimant's PO_2 levels in the ABG. Both of these conditions, according to Dr. Baker, are the result of a combination of coal dust exposure and smoking history. Here, as Dr. Baker diagnoses COPD and moderate hypoxemia (resulting from coal dust exposure) based upon objective data and the physical examination, I accord his finding of legal pneumoconiosis probative weight.

After examining Claimant in April of 2004, Dr. Dahhan diagnosed Claimant to not have coal workers pneumoconiosis or a pulmonary disability secondary to coal dust exposure.[24] He based this upon a clear x-ray, good air entry into the lungs, the non-qualifying PFT, and

[23] As noted above, Dr. Baker is an internist, pulmonologist, and B-Reader.
[24] As noted above, Dr. Dahhan is an internist, pulmonologist, and B-Reader.

Claimant's employment and smoking history. Dr. Dahhan opines however, that Claimant suffers from obstructive airway disease, which is the result of a lengthy smoking history. Dr. Dahhan explains in his deposition that had Claimant possessed a pulmonary impairment resulting from coal dust exposure, it would have shown up sooner. Rather, the obstructive airway disease has not appeared until after fourteen years have passed since Claimant's last coal mine employment. Also, Dr. Dahhan notes that the pulmonary impairment is purely obstructive in nature and could thus not be explained by the inhalation of coal dust. It is more likely, in his opinion, that it is the result of a lengthy smoking history and could also be the side effect of a cardiac medication called "beta blocker Toprol." No where in his opinion however, does Dr. Dahhan explain how Claimant's smoking history or the medication would cause the qualifying ABGs. In fact, Dr. Dahhan never mentions how the qualifying ABG affects his opinion. The Board and some circuit courts have emphasized that pulmonary function and blood gas testing measure different types of impairment. In *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993), the court noted that the Board has held that the results of blood gas and pulmonary function testing "may consistently have no correlation since coal workers' pneumoconiosis may manifest itself in different types of pulmonary impairment." The court cited to *Gurule v. Director, OWCP*, 2 B.L.R. 1-777 (1979), *aff'd.*, 653 F.2d 1368 (10th Cir. 1981). *See also Sheranko v. Jones and Laughlin Steel Corp.*, 6 B.L.R. 1-797, 1-798 (1984) (noting blood gas studies and ventilatory studies measure different types of impairment). Also, Dr. Dahhan fails to recognize the progressive nature of pneumoconiosis as noted in § 718.201. *See Peabody Coal Co. v. Odom*, 342 F.3d 486 (6th Cir. 2003) (noting pneumoconiosis is a progressive and latent disease which "can arise and progress even in the absence of continued exposure to coal dust"); *See also Orange v. Island Creek Coal Co*., 786 F.2d 724, 727 (6th Cir. 1986); *Stewart v. Wampler Brothers Coal Co*., 22 B.L.R. 1-80 (2000) (en banc); *Faulk v. Peabody Coal Co.*, 14 B.L.R. 1-18 (1990); *Andryka v. Rochester & Pittsburgh Coal Co*., 14 B.L.R. 1-34 (1990). Thus, while Dr. Dahhan's opinion is well documented and articulated, because he does not account for the ABG study, and fails to acknowledge the progressive nature of pneumoconiosis, I accord it little weight.

Dr. Almusaddy diagnosed Claimant with coal workers pneumoconiosis based upon the January 6, 2006 PFT, history of abnormal x-rays, and "work history." Nowhere in the opinion however, does Dr. Almusaddy convey how many years of work history he considered in rendering his diagnosis. Dr. Almusaddy also makes note of other x-rays and ABGs, but does not appear to consider them in drawing his conclusions. Dr. Almusaddy also opines that Claimant suffers from COPD due to a lengthy smoking history and coal dust exposure as evidenced by "other PFTs."[25] First off, I note that the January 6, 2006 PFT, while close to being qualifying under the regulations, is a non-qualifying PFT which Dr. Almusaddy relies on for his diagnosis. Second, there is nothing to indicate the length of work history Dr. Almusaddy considered in calculating the history of coal dust exposure. Third, it is not clear if the PFTs he considered are even a part of the record. Because of the lack of evidence (or admissibility of such evidence) to support his conclusions, I accord Dr. Almusaddy's opinion on both clinical and legal pneumoconiosis little weight.

[25] The opinion is silent as to the source of these "other PFTs." It is not clear whether he considers the ones in the record, or perhaps PFTs which are not admitted.

Concerning the finding of coal workers pneumoconiosis, I find Dr. Baker's opinion to be most persuasive, as Drs. Dahhan and Almusaddy's opinions have received little weight. Thus, Claimant has shown the existence of coal workers pneumoconiosis under subsection (a)(4). Furthermore, I have found Dr. Baker's finding of legal pneumoconiosis (chronic bronchitis and COPD with a mild obstructive defect) more persuasive than the finding by Dr. Dahhan, as Dr. Dahhan made no mention of the qualifying ABG study and it was not clear what evidence Dr. Almusaddy relied upon in drawing his conclusion. As such, I find Claimant has established both legal and clinical pneumoconiosis through a reasoned medical opinion under subsection (a)(4).

Considering all of the evidence of record, Claimant has established the existence of pneumoconiosis under subsection (a)(1) and under subsection (a)(4). Therefore, after considering all evidence of pneumoconiosis together under § 718.202(a), I find that Claimant has proven by a preponderance of the evidence that he suffers from both coal worker's pneumoconiosis and legal pneumoconiosis.

Arising out of Coal Mine Employment

In order to be eligible for benefits under the Act, Claimant must also prove that pneumoconiosis arose, at least in part, out of his coal mine employment. § 718.203(a). For a miner who suffers from pneumoconiosis and was employed for ten or more years in one or more coal mines, it is presumed that his pneumoconiosis arose out of his coal mine employment. *Id.* As I have found that Claimant has established twenty years of coal mine employment, he is entitled to this presumption.

Dr. Dahhan opines that Claimant's pulmonary impairment is not the result of the twenty-two years of coal mine employment he considered, but rather is the result of a lengthy smoking history, with the possibility that it may also be the side effect of Claimant's cardiac medication. He states that based upon the evidence, the pulmonary impairment is purely obstructive in nature, and could not be explained by the inhalation of coal dust. Furthermore, Dr. Dahhan notes that the obstructive airway disease has not manifested itself until fourteen years after Claimant's last coal mine employment. Here, Dr. Dahhan again fails to keep in mind the progressive nature of pneumoconiosis when making this statement. Courts have long held that pneumoconiosis is a progressive disease and can take years to detect. *See Mullins Coal Co. of Virginia v. Director, OWCP*, 483 U.S. 135 (1987), *reh'g. denied*, 484 U.S. 1047 (1988) where the Supreme Court stated pneumoconiosis is a "serious and progressive pulmonary condition." *See also Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993) (where the progressive nature of pneumoconiosis is discussed.). Also as noted above, Dr. Dahhan does not take into account the ABG in his analysis, nor does he find either clinical pneumoconiosis or legal pneumoconiosis, which is contrary to my findings above. Considering all this evidence, I give Dr. Dahhan's opinion concerning the etiology of Claimant's pneumoconiosis little weight.

Dr. Baker's reasoning behind legal and clinical pneumoconiosis received probative weight above, and there is nothing to discredit his etiological finding on this matter. As such, I find that Employer has not rebutted the presumption under § 718.203(b), and thus Claimant has shown that his pneumoconiosis arose, at least in part, out of his coal mine employment as required under § 718.203(a).

Total Disability Due to Pneumoconiosis

The amended regulations at § 718.204(c) contain the standard for determining whether Claimant's total disability was caused by his pneumoconiosis. Section 718.204(c)(1) determines that a miner is totally disabled due to pneumoconiosis if pneumoconiosis, as defined in § 718.201, is a "substantially contributing cause" of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it has a material adverse effect on the miner's respiratory or pulmonary condition or if it materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. §§ 718.204(c)(1)(i) and (ii). Section 718.204(c)(2) states that, except as provided in §§ 718.305 and 718.204(b)(2)(iii), proof that the Miner suffered from a totally disabling respiratory or pulmonary impairment as defined by §§ 718.204(b)(2)(i), (ii), (iv), and (d) shall not, by itself, be sufficient to establish that the miner's impairment was due to pneumoconiosis.

Except as provided by § 718.204(d), the cause or causes of a miner's total disability shall be established by means of a physician's documented and reasoned medical report. § 718.204(c)(2). The Sixth Circuit Court of Appeals has stated that pneumoconiosis must be more than a "de minimus or infinitesimal contribution" to the miner's total disability. *Peabody Coal Co. v. Smith,* 12 F. 3d 504, 506-507 (6th Cir. 1997). The Sixth Circuit has also held that a claimant must affirmatively establish only that his totally disabling respiratory impairment (as found under § 718.204) was due - at least in part – to his pneumoconiosis. *Cf.* 20 C.F.R. 718.203(a); *Adams v. Director, OWCP*, 886 F.2d 818, 825 (6th Cir. 1988); *Cross Mountain Coal Co. v. Ward*, 93 F.3d 211, 218 (6th Cir. 1996)(opinion that miner's impairment is due to his combined dust exposure, coal workers pneumoconiosis as well as his cigarette smoking history is sufficient). More recently, in interpreting the amended provision at § 718.204(c), the Sixth Circuit determined that entitlement is not precluded by "the mere fact that a non-coal dust related respiratory disease would have left the miner totally disabled even without exposure to coal dust." *Tennessee Consolidated Coal Co. v. Director, OWCP [Kirk]*, 264 F.3d 602 (6th Cir. 2001). A miner "may nonetheless possess a compensable injury if his pneumoconiosis materially worsens this condition." *Id*.

As stated above, I accord more weight to the newly submitted evidence of record based on its recency and the progressive nature of pneumoconiosis. *Gillespie,* 7 B.L.R. 1-839. The reasoned medical opinions of those physicians who diagnosed the existence of pneumoconiosis and found that Claimant was totally disabled are more reliable for assessing the etiology of Claimant's total disability. *See, e.g. Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819 (4th Cir. 1995); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995). Here, Dr. Baker opines that Claimant's totally disabling pulmonary condition is the result of both coal dust exposure and cigarette smoking. Since this conclusion is based on both history of exposure as well as the results of the objective testing, I accord it probative weight. As for Dr. Dahhan, he finds that Claimant is totally disabled by a pulmonary impairment, but not from the result of coal mine employment or pneumoconiosis. As this is contrary to my finding of pneumoconiosis, I accord his opinion little weight. Finally, Dr. Almusaddy only states that Claimant could not return to his previous coal mine employment and makes no statement as to whether Claimant could perform comparable employment in a dust free environment. He also only qualifies Claimant's

disability as "moderate." As his opinion is equivocal and vague on the etiological issue of total disability, I accord it no weight.

Therefore, I find that Dr. Baker's determination that Claimant is totally disabled due to pneumoconiosis is the most probative, and thus, I find that Claimant has proven total disability due to pneumoconiosis under § 718.204(c).

Entitlement

The Claimant, R.C., has established a material change in conditions sufficient to meet the statutory requirements of § 725.309(d). In addition, considering both the previously submitted and newly submitted medical evidence, he has proven by the preponderance of the evidence that he has pneumoconiosis arising out of coal mine employment, and that his total respiratory disability was caused, in part, by pneumoconiosis. Therefore, R.C. is entitled to benefits under the Act.

Based upon the medical evidence, I cannot determine the month of onset of R.C.'s total disability due to pneumoconiosis. Thus, benefits are payable beginning with the month in which he filed his subsequent application for benefits. *See* § 725.503(b). Claimant filed his application for benefits in April 2003. Therefore, I find that benefits are payable to R.C. beginning in April 2003.

Attorney's Fees

No award of attorney's fees for services to R.C. is made herein, since no application has been received from counsel. A period of 30 days is hereby allowed for Claimant's counsel to submit an application, with a service sheet showing that service has been made upon all parties, including Claimant. The parties have 10 days following receipt of any such application within which to file their objections. The Act prohibits the charging of any fee in the absence of such approval. *See* §§ 725.365 and 725.366.

ORDER

IT IS ORDERED that the claim of R.C. for benefits under the Act is hereby GRANTED.

A

THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).